

REMARKS

Reconsideration of the above-referenced patent application is respectfully requested in view of the foregoing amendments and remarks set forth herein.

In the Office Action of April 1, 2010, the Examiner took the following actions to which Applicant herein makes response: (1) rejected claims 2-7 and 11 under Section 112, second paragraph as being indefinite, stating that “product” is unclear; and (2) provisionally rejected claims 2-5 and 7 under Section 102(b) on the ground of nonstatutory obviousness-type double patenting over claims 1, 2, 5 and 6 of copending SN 11/123,330 (client file BIOA5110). These rejections are traversed in application to the claims as amended, and consideration is requested of the patentability of claims 2-7 and 11-12 now pending in the application.

1) Rejection of claims 2-7 and 11 under Section 112, second paragraph as being indefinite, stating that “product” is unclear

Applicant has amended independent claim 11 and claim 2 to recite an “ingestible product”. Support for this terminology is found in claims 3-7 as filed, and in the published patent application (2006/0002907) particularly in paragraph [0017], as well as being supported elsewhere in the specification, for example, by paragraphs [0018], [0022], and [0035].

Applicant therefore submits that claim 11 as amended herein, and claims 2-7 which contain all of the limitations of claim 11 as amended herein, are patentable under Section 112, second paragraph.

Because the only rejection of claims 6 and 11 herein was this rejection under Section 112, Applicant respectfully submits that claims 6 and 11 are now in condition for allowance, as the lack of clarity of has been removed by this amendment.

If the Examiner does not accept this amendment as making claims 2-7 and 11 sufficiently definite, Applicant respectfully requests a telephonic conference with the Examiner to discuss what type of terminology would be sufficiently definite under Section 112, second paragraph.

2) Provisional rejection of claims 2-5 and 7 under Section 102(b) on the ground of nonstatutory obviousness-type double patenting over claims 1, 2, 5 and 6 of copending SN 11/123,330 (client file BIOA5110)

Applicant respectfully reiterates that claim 1 of copending SN 11/123,330 is for “A liquid oil-based product for improved immune function in mammals, including humans, comprising 3-HPA producing lactic acid bacteria suspended in a medium chain triglyceride oil” and that the other cited claims of the copending application depend from and contain all of the limitations of claim 1 of the copending application. Applicant respectfully submits that there are many types of processes that improve immune function and that lactic acid bacteria that are selected because they produce 3-HPA and lactic acid bacteria that are selected because they have good toxin binding and a toxin neutralizing effect and further cause an increase in the number of CD4+ lymphocytes in samples from a test mammal are not necessarily, or even likely, to be the same strains. These are two different sets of physiological and biochemical criteria, neither of which has been previously used in the manner of these two inventions, and neither of which is an obvious characteristic of a microbial species in view of the other characteristic.

Whether someone has inadvertently used bacteria selected by the instant invention in a product, there is no teaching or suggestion that a product as claimed (not requiring an oil as in the copending application) would have efficacy as claimed for improving immune function in mammals as claimed.

Applicant respectfully submits that the resultant product of the copending application, a “liquid oil-based product for improving immune function... consisting essentially of 3-HPA producing lactic acid bacteria suspended in a medium chain triglyceride oil” is a very different product from the product claimed herein, in which an oil is not present. The use of an oil as in the copending application is neither taught nor suggested by the instant application.

Therefore, Applicant therefore submits that even if copending SN 11/123,330 and the rejected claims herein are patented, there would be no obviousness-type double patenting.

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Should these claims not be found allowable in spite of the above remarks, Applicant is willing to submit a terminal disclaimer, to place the claims in allowable condition, with respect to the instant application and cited copending application, since these two applications are commonly owned.

Conclusion

For all the foregoing reasons, claims 2-7 and 11 are submitted to be fully patentably distinguished over the cited references and in allowable condition. Favorable consideration is therefore requested.

Applicant submits that no new claims have been added and therefore that no fee is required for the presentation of this amendment except for the separately submitted fee for extension of time. Any additional amounts that may be due for presentation of this amendment should be charged to Deposit Account No. 02-0825 of Applicant's attorney.

If any questions or issues remain, the resolution of which the Examiner feels would be advanced by a personal or telephonic conference with Applicant's attorney, the Examiner is invited to contact such attorney at the telephone number noted below.

Respectfully submitted,



Lynn E. Barber
Attorney for Applicants
Registration No. 31,734
P.O. Box 16528
Fort Worth, TX 76162
(817) 361-7131